Supreme Court, U.S.
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No. 86-507

In The

Supreme Court of the United States

October Term, 1986

TRANS INTERNATIONAL AIRLINES,

Petitioner,

vs.

VIRGINIA NEWSOME, *et al.*,

Respondents.

TRANS INTERNATIONAL AIRLINES,

Petitioner,

vs.

CRAIG A. KUECHENMEISTER, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Alabama Supreme Court decide a question of federal law that has not been settled by the United States Supreme Court or, alternatively, did the Alabama Supreme Court decide a federal question in a way in conflict with applicable decisions of the Court?

2. Do regulations promulgated through the Civil Aeronautics Board or by means of airline tariffs preempt the terms of the Warsaw Convention and preclude a cause of action thereunder?

3. Does Article 19 of the Warsaw Convention provide a cause of action to a passenger for a delay in departure of an international charter flight?

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TRANS INTERNATIONAL AIRLINES,

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vs.

CRAIG A. KUECHENMEISTER, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the Petition for a Writ of Certiorari to review the decision, judgment and order of the Supreme Court of Alabama filed on March 28, 1986.

OPINION BELOW

The opinion of the Alabama Supreme Court has been completely reprinted in the Appendix to the Petition for Writ of Certiorari filed by Trans International Airlines.

The published opinion may be found at *Newsome v. Trans International Airlines*, 492 So. 2d 592 (Ala. 1986).

STATEMENT OF JURISDICTION

This Honorable Court should not exercise jurisdiction in this case because Petitioner has not propounded an important question of Federal law which has not been, but should be, settled by this Court; nor has Petitioner presented to the Court a Federal question which has been decided in a way in conflict with applicable decisions of the Court. Sup.Ct. R. 17.1(c) and 21(h).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1.) U. S. CONST. art. VI, cl. 2 which provides in pertinent part as follows:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

2.) Article 19 of the Warsaw Convention, 49 Stat. 3000 *et seq.*, T.S. No. 876, 137 L.N.T.S. 11 (1934) *reprinted at* 49 U.S.C. § 1502, note (1976) which states:

> "The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods."

3.) Article 23 of the Warsaw Convention, 49 Stat. 3000 *et seq.*, T.S. No. 876, 137 L.N.T.S. 11 (1934) *reprinted at* 49 U.S.C. § 1502, note (1976) which provides that:

> "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention."

4.) Section 1106 of the Federal Aviation Act which provides:

> "Nothing contained in the Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

49 U.S.C. § 1506 (1976).

STATEMENT OF THE CASE

The statement of the case set forth by Petitioner, Trans International Airlines, is incomplete and misleading. For that reason and in order to comply with the rules of this Court, Respondents set forth the following statement of the case.

This matter involves a class action on behalf of those participants in a European tour to be provided by Mabel Forrester (individually and doing business as Sky III En-

terprises, "Ambassadors Aboard"). The sub-class of litigants known as the "Kuechenmeister Plaintiffs" constituted the group who were to be transported by a jet airplane chartered through Petitioner, Trans International Airlines, to Athens, Greece. The second sub-class of Plaintiffs (the "Newsome Plaintiffs") were those individuals who were to be transported to Italy on the same chartered flight.

The chartered flight was to depart from Birmingham Airport on March 11, 1979, at 12:30 p.m. The plane did not depart at the designated time. As a result, the Kuechenmeister Plaintiffs lost an "optical excursion" in the nature of a Greek Island cruise; the Newsome Plaintiffs were denied portions of their tour of Italy. Neither Trans International Airlines nor Defendant Forrester made any refunds to the participants in the tour.

The delay in the departure of the chartered flight from Birmingham, Alabama, left approximately three hundred and twenty people stranded overnight in Birmingham. Although the flight was scheduled to depart at 12:30 p.m., on March 11, 1979, it did not actually depart until 8:40 or 9:00 p.m., on March 12, 1979. Despite the fact that the passengers received a confirmation that the charter would depart at 10:30 a.m., on March 12, 1979, the flight was again pushed back until that afternoon. The additional delay left the passengers waiting in the lobby of the Hyatt House Hotel, Birmingham, Alabama. Many individuals did not have a change of clothes for the unanticipated second day in Birmingham since their baggage had already been checked and Trans International did not wish to re-check it or permit the passengers to retrieve

extra clothes. When the flight did not actually take off until 8:40 or 9:00 p.m., on March 12, 1979, a number of passengers had not had anything to eat since noon because Trans International Airlines refused to provide additional meals for the tour participants. After leaving Birmingham, the flight crew did provide the passengers with a meal around 3:00 a.m., on March 13, 1979.

The trial of Plaintiffs' (Respondents') class action against Trans International Airlines and Mabel Forrester resulted in a directed verdict in favor of both Defendants at the close of Plaintiffs' case-in-chief. On appeal to the Alabama Supreme Court, Plaintiffs (Respondents) succeeded in obtaining a reversal of the trial court's ruling with respect to Trans International Airlines. Consequently, this matter was remanded for a retrial.

The Alabama Supreme Court concluded that Article 19 of the Warsaw Convention provided a remedy to passengers for a delay in the departure of an international charter flight. *Newsome v. Trans International Airlines*, 492 So. 2d 592 (Ala. 1986).

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SUMMARY OF THE ARGUMENT WHY WRIT OF CERTIORARI SHOULD BE DENIED

Trans International Airlines' petition for Writ of Certiorari to the Supreme Court of the United States should be denied for the following reasons:

1.) The decision of the Alabama Supreme Court did not decide a question of federal law which has not been

settled by the United States Supreme Court nor did it decide a federal question in a way in conflict with applicable decisions of this Court. Sup. Ct. R. 17.1(c).

2.) Neither the regulations promulgated through the Civil Aeronautics Board nor airline tariffs may preclude a cause of action under the Warsaw Convention to passengers for delays in the departure of international charter flights.

3.) The Warsaw Convention provides a cause of action to a passenger for a delay in the departure of an international charter flight.

———o———

ARGUMENTS SUPPORTING REASONS FOR DENYING WRIT OF CERTIORARI

1. **The Decision of the Alabama Supreme Court did not Decide a question of Federal law which has not been settled by the United States Supreme Court nor did it Decide a Federal question of law in a way in conflict with applicable decisions of this Court.**

"Delay. To retard; obstruct; put off; postpone; defer; procrastinate; prolong the time of or before; hinder. . . ."

BLACK'S LAW DICTIONARY
512 (rev. 4th ed. 1968).

The Warsaw Convention imposes liability on an air carrier for "damage occasioned by delay in the transportation by air of passengers, baggage or goods." Article 19 of the Warsaw Convention, 49 Stat. 3014, T.S. No. 876,

137 L.N.T.S. 11 (1934), *reprinted at* 49 U.S.C. § 1502, note (1976). The Convention does not provide a grace period by means of which air carriers are entitled to immunity for delays in flight departures. Nor does it establish a period for which an airline will not be held liable for delay in a charter flight. Instead, the term "delay" used by the authors of the Convention means precisely what it says. Accordingly, the Alabama Supreme Court adhered to the line of cases which have held that the Warsaw Convention provides the exclusive legal remedy against international air carriers by creating an independent cause of action for persons injured as a result of violations of the provisions of the Convention. *See Benjamins v. British European Airways,* 572 F.2d 913 (2d Cir. 1978); *Abramson v. Japan Air Lines Co.,* 739 F.2d 130 (3rd Cir. 1984); *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways,* 737 F.2d 456 (5th Cir. 1984); *In re Mexico City Air Crash of October 31, 1979,* 708 F.2d 400 (9th Cir. 1983).

There is nothing in the determination by the Alabama Supreme Court regarding federal law which has not been implicitly settled by this Court or which has been determined in a manner which is in conflict with applicable decisions of this body. *Cf. Trans World Airlines, Inc. v. Franklin Mint Corp.,* 466 U.S. 243 (1984); *Nader v. Allegeheny Air Lines,* 426 U.S. 290 (1976).

When examined in a critical manner, it is apparent that the only issue which the Petitioner has presented to this Court is to request that the Court define the word "delay" as it is used in Article 19 of the Warsaw Convention. Petitioner states that the term does not envision any situa-

tion but that in which an unreasonable delay occurs.[1] Petitioner has not, however, submitted any law, treaty, statute or regulation in support of its position. If the authors of the Warsaw Convention had intended to include the term "unreasonable" in Article 19 of that treaty, it is difficult to understand why they did not take such action.

The word "delay" means lateness; tardiness; or postponement. ROGET'S POCKET THESAURUS 30 (1970). As a verb it is syonymous with "to be late," "to dawdle" and "to linger." *Id.* Webster's Seventh New Collegiate Dictionary defines "delay" as "to put off"; "to postpone"; "to stop, detain, or hinder for a time." Webster's continues by stating that "delay usually implies a putting off (as a beginning or a departure)." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 218 (7th ed. 1969).

The term "delay" is that which is used in Article 19 by the signatory countries to the Warsaw Convention. Article 19 provides that a carrier may be liable for "damage occasioned by *delay* in the transportation by air of passengers, baggage or goods." (Emphasis supplied.) The meaning of the term "delay" is clear. As the Alabama Supreme Court correctly recognized, the Convention permits air carriers to be held liable for *any* delay of an international charter flight provided that the delay causes injury or damage to a passenger. An extremely short delay in departure would not injure an individual under ordinary

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[1] If such were a correct interpretation of the term, then it would clearly be for the jury to determine if a departure of thirty-two (32) hours in a charter flight situation was "unreasonable".

circumstances. A significant delay in the departure of a charter flight—such as that which occurred in this instance—can and does cause damage to those being transported. In this case, the Respondents lost substantial portions of the promised vacation to Europe because the TIA charter flight did not depart at the scheduled time.

Respondents would submit that far more compelling issues are presented to this Court than are demonstrated by the Petitioner's attempt to invoke the jurisdiction of the United States Supreme Court in order to have it define a term of common usage and meaning.

2. Neither the Regulations promulgated by the Civil Aeronautics Board nor Airline Tariffs may Preclude a Cause of Action to Passengers for Delays in the Departure of International Charter Flights under the provisions of the Warsaw Convention.

In view of the fact that the Warsaw Convention is a treaty of the United States duly entered into, it is the supreme law of this land. U.S. CONST. art. VI, cl. 2; *In re Air Crash in Bali, Indonesia*, 684 F.2d 1301 (9th Cir. 1982); *Butler's Shoe Corp. v. Pan American World Airways*, 514 F.2d 1283 (5th Cir. 1975). Conflicts between tariffs (or Civil Aeronautics Board regulations) which purportedly limit an airlines' liability and the provisions of the Warsaw Convention must be resolved in favor of the latter since it constitutes the supreme law of the land. *See In re Air Crash in Bali, Indonesia, supra; Butler's Shoe Corp. v. Pan American World Airways, Inc., supra.*

In an analogous situation, the United States Supreme Court in *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976), concluded that Federal regulations governing the aviation

industry are not exclusive to common law rights. The same principle would apply to rights exercised pursuant to the provisions of the Warsaw Convention.

The Civil Aeronautics Board was given broad powers in regard to the regulation of the airline industry by the Federal Aviation Act of 1958, 49 U.S.C. 1301 *et seq.* (1976). The Board was authorized by the Act to formulate regulations concerning air carriers. Similarly, airlines were permitted to draft tariffs and submit them for approval by the C.A.B.[2] But Section 1502 of the United States Code states that the Federal Aviation Act is governed by the obligations assumed by the United States in treaties, in conventions and agreements between the United States and foreign countries. 49 U.S.C. § 1502 (1976). Moreover, § 1106 of the Federal Aviation Act provides that:

> "Nothing contained in the [Federal Aviation] Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the *provisions of this Act are an addition to such remedies.*" (Emphasis supplied) 49 U.S.C. § 1506 (1976).

The Petitioner now requests that this Court permit it to use its tariffs as well as the regulations of the C.A.B.

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[2] The Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 40, 92 Stat. 1705, 1744 (1978), eliminated as of January 1, 1983, the domestic tariff system. 49 U.S.C. § 1551(a)(2)(A) (1976) and Supp. IV (1980). Indeed, in the area of interstate cargo carriers, the Civil Aeronautics Board specifically recognized that by deregulation Congress had eliminated its responsibility to supervise any reasonableness of cargo rates and services and, accordingly, the Board acknowledged that it expected courts to apply the rules of contract and tort law to interstate cargo carriers, irrespective of tariff rules on file with the Board. C.A.B. Order No. 78-7-100 at 7 (July 21, 1978).

in a manner which would preclude a cause of action to a passenger who is not transported from his place of departure at the appropriately scheduled time. The construction of the regulations and tariffs proposed by Petitioner would be in violation of Sections 1502 and 1506 of the United States Code. As those statutes indicate, an international treaty such as the Warsaw Convention preempts federal regulations and airline tariffs.

Article 23 of the Warsaw Convention specifically states that:

> "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down by the convention is null and void. . . . "

The purported "grace period" of 48 hours which Trans International Airlines claims to exist in its tariff and by the language of 14 C.F.R. § 208.32(a) would be a direct violation of Article 23 if the interpretation maintained by Petitioner is accepted by the Court. As the Alabama Supreme Court correctly determined, federal regulatory law and air carrier tariffs cannot be in contravention of the Warsaw Convention. This principle is well known by the Petitioner, Trans International Airlines, because on August 23, 1977, the Civil Aeronautics Board found TIA guilty of following a policy of applying its tariffs disclaiming liability for lost or damaged baggage in international transportation in direct violation of the Warsaw Convention. 74 C.A.B. 664. The Board concluded that TIA's tariff rule which purported to deny liability in all instances involving soft-type baggage claims and claims for property contained in such baggage, as well as its disclaimers regarding items of value, violated Articles 18 and 19 of the Convention. As a result, the C.A.B. held that

the TIA tariff was null and void pursuant to Article 23 of the Warsaw Convention.

In its unanimous opinion the Alabama Supreme Court astutely recognized that the tariff relied on by Trans International Airlines in the present case would violate Article 19 of the Convention if one accepted the interpretation of the language insisted upon by the Petitioner.

3. Article 19 of the Warsaw Convention provides a Cause of Action to a Passenger for a Delay in Departure of on International Charter Flight.

"When the plane you are on is late, the plane you want to transfer to is on time.

THE AIRPLANE LAW

The language of 14 C.F.R. § 208.32(a) demonstrates that Trans International Airlines may not disclaim liability for the delay in the departure of its charter flight because that delay was less than the 48 hour time period specified in the regulation. The regulation simply states that when a charter flight will be delayed more than 48 hours, the airline incurs a duty not found in common law or envisioned by the Warsaw Convention; that is, in such situations it must furnish a substitute flight for its passengers. The provisions found in the regulation clearly do not indicate that if a flight is delayed less than 48 hours redress by its passengers is precluded. This fact is demonstrated by the second sentence of Section 208.32(a) which states:

> "This regulation shall be without prejudice and in addition to any other rights or remedies of passengers under applicable law."

In the circumstance presented to the Alabama Supreme Court, the applicable law was the Warsaw Conven-

tion. The language contained in Article 19 of the Convention provided a remedy to passengers damaged by a delay in their transport by air. Based on that language and the decisions reached by various federal courts of appeal, the Alabama Supreme Court concluded that the Respondents' exclusive remedy against Petitioner for the delay in the departure of its charter flight was by a lawsuit maintained under the guidelines of the Warsaw Convetntion.

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CONCLUSION

There is absolutely no basis for this Court to grant the Petition for Writ of Certiorari filed by Trans International Airlines. A party is only entitled to the issuance of a Writ of Certiorari upon a showing of special or important reasons. The reasons propounded by Petitioner in this case are manifestly insufficient to warrant the issuance of such an extraordinary writ.

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

/s/ Wesley Romine

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APPENDIX

IN THE CIRCUIT COURT FOR
JEFFERSON COUNTY, ALABAMA

CASE NO. CV-79-504-800-WAT
Date of Judgment: 10/29/84
Post Judgment Date: 12/04/84

VIRGINIA A. NEWSOM, et als,

Plaintiffs,

vs.

TRANS INTERNATIONAL AIRLINES, et als,

Defendants.

CASE NO. CV-79-504-961-WAT
Date of Judgment: 10/29/84
Post Judgment Date: 12/04/84

CRAIG KUECHENMEISTER,

Plaintiffs,

vs.

TRANS INTERNATIONAL AIRLINES,

Defendants.

This appeal is taken pursuant to the Final Judgment Order of Judge William A. Thompson, Circuit Judge, Jefferson County, Alabama.

PLAINTIFFS/APPELLANTS.

CLASS REPRESENTATIVES:

Virginia Newsome
Craig Kuechenmeister
Brenda Sharp
Dell Thornell
Martha Rawlinson

Plaintiff/Class Representatives/Appellants.

DEFENDANTS/APPELLEES

Trans International Airlines
Mabel Forrester d/b/a Sky III Enterprises/
Ambassadors Abroad

THE MEMBERS OF THE CLASS ARE AS FOLLOWS:

Jean Adcock
Kenneth Adcock
Lynn Allen
Sara Bell Allen
Billy Jo Armstrong
Helen Armstrong
Anne Askew
Mrs. Katheryn Askew
Carl Chambers
Joan Chambers
Rita Chambers
Vandalyn Champlin
Betty Cooper
Earl Cooper
Mrs. Mary Cooper
Susan Keuchenmeister
Craig Keuchenmeister
Beverly Lavender
Annette Lawrence
Mrs. Ralph E. LeMay
James Lindsley
Ms. Leah Mayo
Hazel Mays
Karyon McMinn
Tammy Lou Eaves
Steve Edwards
Jane K. Farley
Losi B. Field
Betty Fincher
Linda Flippo
Flo Fraley
Edith Freeman
Harry Boyd
Margaret Brent
Lauren Burton
Mary W. Burton
Ralph Cadenhead
Hazel Camp
B. T. Carte, Jr.
Dr. Harry Askew
Mrs. Mary Baker
Neal Beavers
Mrs. Lawrence Beck
Oleta M. Beck
Edward Bennett
Patricia Bennett
Jacqueline Cox
Norman Cox
Nacy Crippen
Mrs. J.M. Deupree
Eleanor DeYoung
Merry Virginia Dixon
Alice G. Duckett
David Duckett
Nancy Earwood

Lucille McMinn
Jannet Morrow
Marcelle Morrow
Jan Nale
Clarence Naylor
Kathy Naylor
Thomas Nix
Paula Norman

Ethel Graham
Mary J. Grahl
Mr. Nellie Greer
Denise Hauck
Faye Hopson
Dr. David Johnson
Dr. Linda Johnson
Liz Johnson
James Jolly
Joyce Jolly
Linda Jones
Daniel Keeler
Ruth Keeler
Steven Sanders
Roberta Shults
Joy Smith
Essie Smitherman
U.K. Snow
Denise Strange
Judy Tease
Pauline Todd
Lisa Marie Trimble
Mrs. Jodi Tuck
Patricia S. Ward
Mary H. Webb
Eveylon Westbrook
Lillian Abbott
Joan Ruth Ables
Dorothy Hornbuckle
Yvonne Houben
Betty Ann Beavers
Lindia Booth
Guesna Bush
Cecil R. Loveless
Milton Maddox
Joe Daniel
Andrea McInnis
Rebecca Miller
Clare Mosley
Mrs. Kate Pilkinton
Susan Portugues
Willie Mae Powell
Mitch Pruitt
Dorothy W. Ramsey
Edward L. Ramsey
Mrs. William Rawles
Cynthia B. Ross
Jodi Rutenbery
Glenn Sanders
Horace Sanders
Cathleen Sanders
Mary Jane Sanders
William Sanders
Garnett Simcox
Mike Smith
Mary Snow
Winton Stevenson
Joanne Strange
James Todd
Harry Trimble
Rita Trimble
Jean Tunnery
Steve Ward
Clyde Westbrook
Joy Wollfe
Henry H. Hawkins
Jacqueline Bank
Cynthia Houben
Jennie Sue Jolly
Foy Blackmon
Mrs. D.C. Lambert
Clara Bussie
Jimmy Mackey
Wanda Maddox
Mary Linda McDowell
Fred Freshwater
Joanna Freshwater
Jennifer Lynn Gamble

Edith S. Newsom
Zola Haralson
William E. Hartin
Allison Hawkins
Max Reynolds
Joe Russell
Nelson Gresky
Ruth Stevenson
Violet Saxon
Brenda Sharpe
Stephanie Sizemore
June M. Vance
Mary Susan Williams
Mavis Wooten
Mrs. Kathy Allbritten
Sister Regina Barrett
Reba Beason
Johnnie Boles
Mariam Hanson
John Hargett
Mrs. D. M. Hargett
Mary Joe Harrell
Norene Hyde
Cloyace Isbell
Sister Mary Jacobs
Beth Darnell
Mary Gladys Devers
Kim Kleyla
Modean Downey
Donald Estep
Stella Estep
Edna Fawcett
R. L. Fawcett
Jennie M. Frazier
Esther Fritts
Helen Glasscock
Kenneth Glasscock
Betty M. Nichols
Kitty Perkins
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Margaret Scarborough
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Loretta Smith
Wendy Westbrook
Bettie S. Wilson
Mary Leigh Zook
Susan Gregg
R. W. Hagerty
Thelma Hagerty
Kathryn Hall
James B. Carden
Sara R. Carden
Chris Christensen
Irene Christensen
Dean Cress
Mary J. Cruger
Frances King
Leslie King
Deborah Kissell
John T. Morris
Herbert Lanier
Jean Lanier
Shirley Maize
Ruth Melton
Carolyn Miles
Kelly Montgomery
Mary Huber
Mrs. Betty Murdock
Virginia Ann Newsome
Dan Perkins
Alice Petty
Wallace Potts

Martha Ann Rawlinson
Jewel Rogers
Sister Roberta Schmidt
Eunice Stubblefield
Kathy Huber
Celia Vena
Suzanne Willingham
John Richard Robbins
John Rogers
Hazel Speigner
James Stubblefield
Dell Thornell
Joseph Vena
Ida Zyriek